TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 213

SETH DEWING AND EPHRAIM GRAHAM, PLAINTIFFS IN ERROR,

vs.

DAVID SEARS, JR., F. R. SEARS, AND K. W. SEARS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED DECEMBER 10, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 340.

SETH DEWING AND EPHRAIM GRAHAM, PLAINTIFFS IN ERROR,

vs.

DAVID SEARS, JR., F. R. SEARS, AND K. W. SEARS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Bond	3	1
Citation and service	5	2
Summons	7	3
Bond	9	4
Declaration	11	5
Defendants' plea	18	7
Agreed statement of facts	21	9
Copy of lease	22	10
Judgment	25	12
Appointment of assessor	26	13
Report of assessor	27	13
Final judgment	29	14
Clerk's certificate	29	14
Judge's certificate	30	14

1 UNITED STATES, *ss:*

[SEAL.] The President of the United States to the judges of the superior court of the Commonwealth of Massachusetts for the county of Norfolk, greeting:

Because that, in the record and process and also in the rendering of judgment, in a suit before you, or some of you, between David Sears, junior, Frederick R. Sears, and Knyvet W. Sears, all of Boston, in the county of Suffolk, gentlemen, plaintiffs, and Seth Dewing, of Needham, in the county of Norfolk, manufacturers, and Ephraim Graham, of Fitchburg, in the county of Middlesex, gentlemen, defendants, in a plea of an action of contract, a manifest error has intervened, to the great damage of the said Dewing and Graham, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-third.

JOHN G. STETSON, *Clerk.*

Allowed by—

NATHAN CLIFFORD,
Associate Justice Sup. C't U. S.

2 COMMONWEALTH OF MASSACHUSETTS, *Norfolk, ss:*

And now the judges of the superior court of said commonwealth, for the county of Norfolk, make return of this writ by annexing hereto and transmitting herewith, under the seal of the said court, as within commanded, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein, and all things concerning them.

In testimony whereof I, Erastus Worthington, clerk of the said court within and for said county of Norfolk, have hereunto set my hand and the seal of said court this ninth day of February, in the year of our Lord eighteen hundred and sixty-nine.

[SEAL.] ERASTUS WORTHINGTON,
Clerk of the Superior Court of the Commonwealth of Massachusetts for the County of Norfolk.

3 *Bond on writ of error.*

Know all men by these presents that we, Seth Dewing, of Needham, in the county of Norfolk, and Ephraim Graham, of Fitchburg, in the county of Worcester, as principals, and Joel H. Hills, of Newton, and William S. Hills, of Boston, as sureties, all in the district of Massachusetts, are held and firmly bound ~~unto~~ David Sears, jr., Frederic R.

Sears, & Knyvet W. Sears, in the full and just sum of one thousand dollars, to be paid to the said David Sears, jr., Frederic R. Sears, & Knyvet W. Sears, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this third day of February, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at a superior court of the Commonwealth of Massachusetts for the county of Norfolk, in a suit depending in said court between said David Sears, jr., Frederic Sears, & Knyvet W. Sears, plaintiffs, and said Dewing & Graham, defendants, judgment was rendered against the said Dewing & Graham, and the said Dewing & Graham having procured a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said David Sears, jr., Frederic R. Sears, & Knyvet W. Sears, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Dewing & Graham shall prosecute their said writ of error to effect, and answer all damages and costs, if he fail to make their plea good, then the above obligation to be null and void; else to remain in full force and virtue.

SETH DEWING. [L. S.]
EPH'M GRAHAM. [L. S.]
JOEL H. HILLS. [L. S.]
W'M S. HILLS. [L. S.]

Signed, sealed, and delivered in presence of—
E. M. BIGELOW.

Approved:

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C. Mass. Dist.

4

5 The United States of America to David Sears, junior, Frederick R. Sears, and Knyvet W. Sears, all of Boston, in the State of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the superior court of the Commonwealth of Massachusetts, county of Norfolk, wherein Seth Dewing, of Needham, in the county of Norfolk, manufacturer, and Ephraim Graham, of Fitchburg, in the county of Middlesex, gentleman, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

6 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

February 9, 1869.

We hereby acknowledge services of this citation.

SOHIER & WELCH,
Atty's for Def'ts in Error.

7 COMMONWEALTH OF MASSACHUSETTS, *Norfolk, ss:*

To all persons to whom these presents shall come, greeting:

Know ye that, among our records of our superior court for said county, it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

[SEAL.] To the sheriffs of our several counties, or their deputies, greeting:

We command you to attach the goods or estate of Seth Dewing, of Needham, in the county of Norfolk, manufacturer, and Ephraim Graham, of Fitchburg, in the county of Middlesex, gentleman, to the value of seven hundred dollars, and for want thereof to take the bodies of the said defendants, (if they may be found in your precinct,) and them safely keep, so that you have them before our justices of our superior
8 court next to be holden at Dedham, within and for our said county of Norfolk, on the third Monday of September next, then and there in our said court to answer unto David Sears, junior, Frederick R. Sears, and Knyvet W. Sears, all of Boston, in the county of Suffolk, gentlemen, in an action of contract, to the damage of the said plaintiffs (as they say) the sum of seven hundred dollars, which shall then and there be made to appear, with other due damages; and have you there this writ, with your doings therein.

Witness Charles Allen, esquire, at Boston, the eighth day of July, in the year of our Lord one thousand eight hundred and sixty-four.

JOSEPH WILLARD, *Clerk.*

[50-cts. stamp cancelled.]

Upon which said writ is the following by the officer who served the same:

JULY 13, 1864.

SUFFOLK, *ss:*

By virtue hereof I have this day attached the goods and estate of the within-named Seth Dewing and Ephraim Graham. On the 25th day of said July I delivered to each of them, in hand, a summons for their appearance at court. Subsequently said def'ts filed with me the annexed bond.

E. W. SANBORN,
Dep. Sheriff.

Attachment	1 00
Custody & aff't	1 20
Travel & service, summons	1 48
	3 68

I certify that these fees and charges are just and reasonable, and have been incurred.

E. W. SANBORN,
Dep. Sheriff.

Sworn to before me Sept. 9, 1864.

W'M A. HERRICK,
Jus. of the Peace.

And said writ has the following bond attached thereto:

Know all men by these presents that we, Seth Dewing, of Needham, in the county of Norfolk, manufacturer, and Ephraim Graham, of Fitchburg, in the county of Middlesex, and Commonwealth of Massachusetts, as principals, and James Garland, of Boston, in the county of Suffolk, and Joel H. Hills, of Newton, in said county of Middlesex, as sureties, are holden and stand firmly bound and obliged unto David Sears, junior, Frederick R. Sears, and Knyvet W. Sears, all of Boston, in the county of Suffolk, in the full and just sum of seven hundred dollars, to be paid unto the said David, Frederick R., and Knyvet W. Sears, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the 13th day of July, in the year of our Lord one thousand eight hundred and sixty-four.

The condition of this obligation is such, that whereas the said David, Frederick R., and Knyvet W. Sears have caused the goods and estate of the said Dewing and Graham, to the value of seven hundred dollars, to be attached on mesne process in said action, by virtue of a writ bearing date the 8th day of July, A. D. 1864, and returnable to the superior court next to be holden at Dedham, within and for the county of Norfolk, on the third Monday of September next, in which said writ the said David, Frederick R., & Knyvet W. Sears are plaintiffs, and the said Dewing and Graham are defendants; and whereas the said defendants wish to dissolve the said attachment according to the provisions of the general statute in such cases made and provided:

Now, therefore, if the above-bounden Dewing and Graham shall pay to the plaintiff in said action the amount, if any, which he shall recover therein within thirty days after the final judgment in said action, then the above written obligation shall be null and void; otherwise to remain in full force and virtue.

SETH DEWING. [SEAL.]
EPH. GRAHAM. [SEAL.]
JAMES GARLAND. [SEAL.]
JOEL H. HILL. [SEAL.]

Signed, sealed, & delivered in the presence of—
Witness J. Garland's sig. R. R. RAY.
L. W. SPAULDING, for J. H. Hills.

11 On the said third Monday of September, A. D. 1864, the plaintiffs appeared by their attorneys, Sohier & Welch, and entered the above action, and filed the following declaration:

NORFOLK, *ss:*

Superior court, September term, 1864.

DAVID SEARS, JR., & ALS., *vs.* SETH DEWING & AL. } Plaintiffs' declaration.

And the plaintiffs say that an indenture was made and concluded on the fourteenth day of August, eighteen hundred and twenty-eight, between David Sears, of the one part, and Samuel Battles & Edward Goodhue of the other part, whereby the said David Sears bargained, released, and confirmed to the said Battles & Goodhue a certain tenement, situate on Gravelly Point, in Roxbury, in the county of Norfolk, bounded westerly by a line running parallel with the Tide Mill road, so called, leading from the cross-dam of the Boston & Roxbury Mill Corporation, and twenty-five feet distant easterly from the centre of said Tide Mill road, eighty-six feet one inch; then, turning at a right angle and bounded northerly by other land of said David Sears, two hundred and seven feet; then, turning at a right angle and bounded easterly by a canal dug by the said David Sears, & by Israel Thorndike &
12 Ebenezer Francis, now deceased, eighty-six feet one inch; then turning at a right angle, and bounded southerly by land of the heirs or devisees of said Ebenezer Francis, two hundred and seven feet, with the privileges and appurtenances thereto belonging, and subject to the restrictions therein named, to hold to them, the said Battles & Goodhue, their heirs, executors, administrators, successors, and assigns, for and during the term of one hundred years, upon condition of their punctually yielding and paying therefor and thereout to the said David Sears, his heirs and assigns, the yearly rent of four ounces two pennyweights and twelve grains of pure gold in coined money, to be paid in four equal and quarter-yearly payments, on the first days of the months of September, December, March, and June, in each year during such term, without any diminution, deduction, abatement, or defalcation whatever for or on account of any taxes, charges, or assessments at any time assessed or laid on the bargained premises, or any improvements thereon, or for or on account of any cause or matter whatever, the first payment to be made on the first day of March next ensuing the date thereof. And in and by said indenture the said Battles & Goodhue, for themselves, their heirs, executors, adminstrators, successors, and assigns, did, amongst other things, covenant and agree with said David Sears, his heirs, executors, administrators, and assigns, to well and truly
13 pay the said yearly rent therein reserved as aforesaid, on the days and times therein appointed, without fraud, delay, or deduction, as aforesaid.

And the said Battles & Goodhue entered upon the premises described in said indenture, under and by virtue thereof, and continued to occupy the same as tenants under the same. And subsequently all the right, title, and interest in and under said indenture of lease, by divers mesne conveyances, was assigned and transferred to and vested in the defendants, who entered thereunder and occupied the same. And subsequently, on the tenth day of February, eighteen hundred and fifty-nine, the said David Sears, by his deed of that date duly acknowledged and recorded,

conveyed all his interest in said land at Gravelly Point, and the reversion thereof, to the plaintiffs, to have and to hold to them and the survivor, his heirs, and assigns, forever; by virtue whereof the said plaintiffs became possessed of said reversion, and entitled to receive the rent thereof under said indenture of lease, and the defendants attorned to them as assignees of the lessors. And subsequently there became due from the defendants to the plaintiffs, as such assignees, as rent under and by virtue of said indenture and the covenants thereof, on the first day of June, eighteen hundred and sixty-three, for the quarter then ending, one ounce and fifteen grains of pure gold, payable in coined
14 money, by the terms of said indenture; and on the first day of September, eighteen hundred and sixty-three, one ounce and fifteen grains more of pure gold, payable as aforesaid; and, on the first day of December, eighteen hundred and sixty-three, one ounce and fifteen grains more of pure gold, payable as aforesaid; and on the first day of March, eighteen hundred and sixty-four, one ounce and fifteen grains more of pure gold, payable as aforesaid; and on the first day of June, eighteen hundred and sixty-four, one ounce and fifteen grains more of pure gold, payable as aforesaid. And the plaintiffs demanded the delivery and payment, according to the terms of said indenture, of said pure gold on each of said days, but the defendants refused to deliver and pay the same, and still refuse to deliver and pay the same. And the plaintiffs allege that the value of said amount of pure gold which ought to have been delivered and paid to them as aforesaid is four hundred dollars.

Also that another indenture was made & concluded on the fourteenth day of August, eighteen hundred and twenty-eight, between the said David Sears, of the one part, and said Samuel Battles & Edward Goodhue, of the other part, whereby the said David Sears bargained, released, and confirmed to the said Battles and Goodhue a certain tenement, situate on Gravelly Point, in Roxbury, in the county of Norfolk, bounded westerly by a line running parallel with the Tide Mill road, so called,
15 leading from the cross-dam of the Boston & Roxbury Mill Corporation, and twenty-five feet distant easterly from the centre of said Tide Mill road, eighty-six feet one inch; then turning at a right angle, and bounded northerly by other land of said David Sears, two hundred and seven feet; then, turning at a right angle, and bounded easterly by a canal dug by the said David Sears, and by Israel Thorndike & Ebenezer Francis, now deceased, eighty-six feet one inch; then, turning at a right angle, and bounded southerly by land of the heirs or devisees of said Ebenezer Francis, two hundred and seven feet, with all the privileges and appurtenances thereto belonging, and subject to the restrictions therein named, to hold to them, the said Battles & Goodhue, their heirs, executors, administrators, successors, and assigns, for and during the term of one hundred years, upon condition of their punctually yielding and paying therefor and thereout to the said David Sears, his heirs and assigns, the yearly rent of four ounces two pennyweights and twelve grains of pure gold in coined money, to be paid in four equal and quarter-yearly payments on the first days of the months of September, December, March, and June, in each year during such term, without any diminution, deduction, abatement, or defalcation whatever for or on account of any taxes, charges, or assessments at any time assessed or laid
16 on the bargained premises, or any improvements thereon, or for or on account of any cause or matter, the first payment to be made on the first day of March next ensuing the date thereof. And it was also covenanted and agreed by and between said parties in said indent-

ure that if said rent, or any part thereof, should be in arrear and unpaid after any day on which the same ought to be paid as aforesaid, then it should be lawful for the said David Sears, his heirs, executors, administrators, and asigns, to sue, recover, and receive the same with interest & costs & charges, by attachment & sale of any property, real or personal, belonging to said Battles & Goodhue, their heirs, successors, and assigns, in the manner in which an action for debt at the date of said indenture, or might thereafter be by law recoverable. And the said Battles & Goodhue entered upon the premises described in said indenture under and by virtue thereof, and continued to occupy the same as tenants under the same. And subsequently all the right, title, and interest in and under said indenture of lease by diverse mesne conveyances was assigned and transferred to and vested in the defendants, who entered thereunder and continued to occupy the same. And subsequently, on the tenth day of February, eighteen hundred and fifty-nine, the said David Sears, by his deed of that date duly acknowledged and recorded, conveyed
17 all his interest in said land at Gravelly Point and the reversion thereof to the plaintiffs, to have and to hold to them and the survivor, his heirs, and assigns, forever; by virtue whereof the said plaintiffs became possessed of said reversion and entitled to receive the rent thereof under said indenture of lease, and the defendants attorned to them as assignees of the lessors. And subsequently there became due from the defendants to the plaintiffs, as such assignees, as rent, under and by virtue of said indenture and the covenants and provisions thereof, on the first day of June, eighteen hundred and sixty-three, for the quarter then ending, one ounce & fifteen grains of pure gold, payable in coined money by the terms of said indenture; and on the first day of September, eighteen hundred and sixty-three, one ounce and fifteen grains more of pure gold, payable as aforesaid; and on the first day of December, eighteen hundred and sixty-three, one ounce and fifteen grains more of pure gold, payable as aforesaid; and on the first day of March, eighteen hundred and sixty-four, one ounce and fifteen grains more of pure gold, payable as aforesaid; and on the first day of June, eighteen hundred and sixty-four, one ounce & fifteen grains more of pure gold, payable as aforesaid. And the plaintiffs demanded the delivery and payment, according to the terms of said indenture, of said pure gold on each of said days, but the defendants refused to deliver and pay the same, and still refuse to deliver and pay the same.
18 Whereby an action accrued to the plaintiffs to recover of the defendants the value of said pure gold, to wit, the sum of four hundred dollars.

SOHIER & WELSH,
Pl'tiffs' Attorneys.

And the defendants appeared by E. M. Bigelow, esq., their attorney, and filed the following on the twentieth day of September, 1864:

COMMONWEALTH OF MASSACHUSETTS, *Norfolk, ss:*

The superior court, September term, 1864.

DAVID SEARS, JR., & AL., PLAINTIFFS,
SETH DEWING & ANOTHER, DEFENDANTS.

I, Seth Dewing, on behalf of the defendants in the above-entitled ac-

tion, on oath say that I verily believe that they have a substantial defence thereto on its merits, and intend to bring the same to trial.

SETH DEWING.

SEPT. 19, 1864.

SUFFOLK, *ss:*

Subscribed and sworn to before me.

E. M. BIGELOW,
Justice of the Peace.

19 And the said defendants, by their attorney aforesaid, on the said 20th day of September, A. D. 1864, also filed the following:

NORFOLK, *ss:*

Superior court, September term, 1864.

DAVID SEARS, JR., & ALS., *v.* SETH DEWING & AL. } 250.—Offer of judgment.

And now the defendants come into court, on this twentieth day of September, A. D. 1864, being the second day of said term, and offer and consent in writing to be defaulted, and that judgment shall be rendered against them as damages for the sum of one hundred and twenty dollars.

By their attorney,

E. M. BIGELOW.

And the said defendants, by their attorney aforesaid, on the sixth day of October, A. D. 1864, filed the following answer to the plantiffs' declaration:

NORFOLK, *ss:*

Superior court, Sept. term, 1864.

DAVID SEARS, JR., & ALS., *vs.* SETH DEWING & AL. } No. 250.—Defendants' answer.

And now the defendants come and for answer say that they
20 have always been ready and willing to pay to the plaintiffs the several quarters' rent sued for in this action, and at the times the same respectively fell due they offered to pay the same in lawful money, but the plaintiffs refused to receive the same, and demanded payment in coined gold. And the defendants have since, both before and after action, brought repeatedly and many times offered to pay the said rent to the plaintiffs in lawful money, but the plaintiffs refused to receive the same, and demanded payment in coined gold. And, on the tenth day of September, A. D. 1864, the defendants formally tendered to the plaintiffs' attorneys in this suit the sum of one hundred and ten dollars, in lawful money, in respect of the rent sued for in this action, and the further sum of six dollars, in respect of the legal costs of suit incurred up to that time, and they now bring the same into court.

By their attorney,

E. M. BIGELOW.

And thence the action was continued to the December term. And the parties appeared, and afterwards during said term filed the following agreed statements of facts:

21 NORFOLK, *ss:*

Superior court, September term, 1864.

DAVID SEARS, JR., & AL., *vs.* SETH DEWING & AL. } No. 185.

The parties agree to the following statement of facts:

This is an action to recover damages for non-payment of rent, reserved in a lease, a copy whereof is hereto annexed. The rent sued for is for the quarters ending June 1, 1863, September 1, 1863, December 1, 1863, March 1, 1864, and June 1, 1864. Before these dates the reversion has duly vested in the plaintiffs, the term had come to the defendants by assignment, and the rent reserved in the lease had become due for each of said quarters. The defendants had on each quarter day, except March, 1864, offered to pay the plaintiffs United States notes, (commonly called greenbacks or legal tender,) issued under acts of Congress of February 25th, 1862, ch. 33, July 11th, 1862, ch. 142, and March 3d, 1863, ch. 73, § 3, of various denominations, amounting, according to the denominations, to twenty-two dollars, offering the same in full for the rent due, and on March 2d, 1864, United States notes of various denominations, amounting, according to the denominations, to twenty-one dollars, and postal currency amounting, according to their denominations, to thirty-five cents, offering the same in full for the rent due, and plaintiffs in each case declined to receive the same in full of such quarter's rent, but demanded payment according to the terms of the lease. On September 10th, 1864, the defendants tendered to the plaintiffs' attorneys in this suit other similar United States notes, amounting, according to their denominations, to one hundred and ten dollars, in respect of said rent, and other similar United States notes, amounting, according to their denominations, to six dollars, in respect of the costs of said suit, but the plaintiffs' attorneys declined to receive them; and said notes, so tendered as aforesaid, the defendants brought into court at the time of filing their answer.

One ounce and fifteen grains of pure gold were of much larger value in the market at the time each quarter became due than United States notes, amounting, according to their denominations, to twenty-two dollars, and five ounces three pennyweights and three grains of pure gold were of much larger value in the market than one hundred and ten dollars in United States notes at the time of said tender. After the entry of the action the defendants filed an offer of judgment, which, with the declaration and answer, may be referred to.

The court are to enter such judgment as in their opinion is proper upon the foregoing statement, and the pleadings and papers in the case; and, if necessary, the case may be sent to an assessor to estimate, under the direction of the court, the damages which the plaintiffs are entitled to recover.

SOHIER & WELCH,
For Plaintiffs.
E. M. BIGELOW,
For Defendants.

22 This indenture, made and concluded this fourteenth day of August, in the year of our Lord one thousand eight hundred and twenty-eight, between David Sears, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, esquire, on the one part, and Edward Battles and Samuel Goodhue, both of said Boston, on the other part, witnesseth that the said David Sears, for and in consideration of the rent, taxes, and conditions, and performance of the covenants hereinafter reserved, contained, and expressed on the part of said Battles and Goodhue, their heirs, executors, administrators, successors, and assigns, to be paid and performed, hath bargained, released, and confirmed, and by these presents doth bargain, release, and confirm, unto the said Battles and Goodhue, his the said Sears' certain tenement, consisting of the land herein described, and the improvements thereon, situated and bounded as follows, viz: A certain piece or parcel of land situated on Gravelly Point, in the town of Roxbury, and county of Norfolk and State aforesaid, bounded and described as follows, viz: beginning at a point on the line dividing land belonging to Eben Francis, esq., and David Sears, twenty-five feet distant, in an easterly direction from the centre of the Tide Mill road, so called, leading from the cross-dam built by the Boston and Roxbury Mill Corporation, and running northerly and parallel with said Tide Mill road, and twenty-five feet distant in an easterly direction from the centre of said Tide Mill road, until it comes to a stake, there measuring eighty six feet and one inch; then turning at right angles and running easterly and bounded northerly by land of said Sears until it comes to a canal dug by Israel Thorndike, David Sears, and Eben Francis, esq., there measuring two hundred and seven feet; then turning at right angles and running southerly and bounded easterly by said canal until it comes to land of Eben Francis, esq., there measuring eighty-six feet and one inch; then turning at right angles and running westerly and bounded southerly by land of Eben Francis, esq., until it comes to the point of beginning, there measuring two hundred and seven feet, subject to all the reservations, restrictions, limitations, conditions, and obligations which said Sears may be under as per deed of indenture between Israel Thorndike, Eben Francis, David Sears, and the Boston and Roxbury Mill Corporation, dated the first day of March, eighteen hundred and twenty, and as per deed of indenture of division between Israel Thorndike, Eben Francis, and David Sears, dated the fourteenth day of February, eighteen hundred and twenty-two, and recorded in Norfolk County registry of deeds, book 64, pages 156, 157, 158, and 159, reference to both of said indentures to be had, with all the privileges and appurtenances thereto belonging:

To have and to hold the same premises to the said Battles and Goodhue, their heirs, executors, administrators, successors, and assigns, for and during the term of one hundred years from the date hereof, upon condition of their punctually yielding and paying therefor and thereout, to the said David Sears, his heirs, and assigns, the yearly rent of four ounces two pennyweights and twelve grains of pure gold, in coined money, to be paid in four equal and quarter-yearly payments, on the first days of the months of September, December, March, and June, in each and every year hereafter, during such term, without any deduction, abatement, diminution, or defalcation whatever for or on
23 account of any taxes, charges, or assessments which shall or may hereafter, at any time, be assessed or laid either on the hereby bargained premises, or on the improvements thereof, or for or on account of any matter or cause whatever, the first payment to be made on the

first day of March next ensuing the date hereof. And if it shall happen that the said yearly rent hereby reserved, or any part thereof, shall be in arrear and unpaid after any day whereon the same ought to be paid as aforesaid, then it shall and may be lawful to and for the said David Sears, his heirs, executors, administrators, and assigns, to sue for, recover, and receive the same, with interest and costs and charges, by attachment and sale of any property, real or personal, belonging to the said Battles and Goodhue, their heirs, successors, or assigns, in the manner and form in which an action for debt is now, or hereafter may be, by law recoverable, and if property sufficient to satisfy, pay off, and discharge the said rent so in arrear, with interest, and the charges of recovering the same, shall not be found, then it shall and may be lawful to and for the said David Sears, his heirs, executors, administrators and assigns, into the hereby bargained premises, and the improvements thereon erected, wholly to re-enter, and thereout and therefrom wholly expel the said Battles and Goodhue, their heirs, executors, administrators, successors, and assigns, and every occupier and occupiers thereof, and the same again to have, hold, re-occupy, and enjoy, to all intents and purposes whatsoever, both at law and in equity, as of his and their former estate, anything hereinbefore contained to the contrary notwithstanding, and as if this indenture had not been made. And the said Battles and Goodhue, for themselves and their heirs, executors, administrators, successors, and assigns, doth hereby covenant, promise, and agree to and with the said David Sears, his heirs, executors, administrators, and assigns, that they, the said Battles and Goodhue, their heirs, executors, administrators, successors and assigns, shall and will well and truly pay, as aforesaid, all and singular the taxes, rates, charges, and assessments which shall from time to time be assessed and laid on the premises hereby bargained, or which may be made thereon for or on account of any matter or cause whatever, and shall also well and truly pay the said yearly rent hereby reserved, and every part thereof, as aforesaid, on the days and times hereinbefore mentioned and appointed for payment thereof, without any fraud or further delay, and without any deduction, abatement, diminution, or defalcation whatsoever, for or by reason of the payment of any taxes, rates, charges, or assessments, or for or on account of any matter or cause whatever, and shall and will, within the space of two years from the date hereof, erect, build, and finish, or cause so to be, on the said hereby bargained premises, a good and substantial two-story building or buildings, to be at least of the value of twenty times the amount of yearly rent herein above reserved. And the said Battles and Goodhue covenants, for themselves and their heirs, executors, administrators, successors, and assigns, quietly to quit and surrender up the premises at the end of the term herein demised.

And it is agreed that said Sears, his heirs and assigns, at his and their option, and for his and their benefit, may from time to time, and at any time, at the expense of said Battles and Goodhue, their heirs, successors, and assigns, procure the said building and premises to be insured from destruction or damage by fire, and also if possible from other detri-
24 ment, at the full or any partial value or proportion thereof; and, in case the same is damaged by fire or otherwise, the said Battles and Goodhue, their heirs, successors, or assigns, shall have the proceeds of said insurance, if effected, provided said Battles and Goodhue, their heirs, successors, or assigns, rebuild and refit the building and premises in the same manner, and of as good materials, as those damaged or destroyed, within six months from the time of said destruction or damage,

and not otherwise. And the said David Sears, for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said Battles and Goodhue, their heirs, executors, administrators, successors, and assigns, that the said Battles and Goodhue, or they paying the said hereby reserved yearly rent on the days and times, in the way and manner, hereinabove specified therefor, and performing the covenants and agreements herein contained on Battles and Goodhue, and their part to be done and performed, shall and may, during the abovementioned term of years, freely, peaceably, and quietly occupy and enjoy the said hereby bargained premises, with all improvements and appurtenances, without any lawful let, suit, or hindrance, molestation, or eviction of him, the said David Sears, his heirs, or assigns; it being understood that he, and his heirs, executors, administrators, and assigns are not to be and shall not be liable to any claim or action for damages if the said Battles and Goodhue, their heirs, executors, administrators, successors, or assigns are at any time hereafter ejected from the premises by any person or persons having title and estate superior and paramount to the title and estate of said Sears, recorded in Norfolk County registry of deeds, libro 64, folios 156, 157, 158 and 159.

In witness whereof the said parties to these presents, together with Miriam, the wife of said David, in testimony of her assent to the foregoing demise, have hereunto interchangeably set their hands and seals the day and year first above written.

EDWARD BATTLES. [SEAL.]
SAM'L GOODHUE. [SEAL.]
DAVID SEARS. [SEAL.]
MIRIAM C. SEARS. [SEAL.]

Signed, sealed, and delivered in presence of—
ANNA P. G. SEARS.
SAM'L D. PARKER.
AMOS COTTING.

BOSTON, *Aug. 15th*, 1828.

COUNTY OF SUFFOLK, *ss:*

Then the above-named David Sears and Edward Battles and Samuel Goodhue personally appeared and respectively acknowledged the foregoing instrument, by them severally signed, to be their and each of their voluntary act and deed, and desired the same, as such, might be recorded.

Before me,

SAM'L D. PARKER,
Justice of the Peace.

Filed Dec. 21, 1864.

E. W. SAMPSON, *Clerk.*

(Indorsed:) No. . Sears, jr., & al., v. Dewing & al.

25 And thereupon the presiding judge ordered judgment pro forma for the defendants; from which judgment the plaintiffs appealed unto the supreme judicial court for the said commonwealth.

And thence the action was continued from term to term; and on the 9th day of November, 1867, the following rescript from the supreme judicial court was received and entered upon the docket in said action:

Commonwealth of Massachusetts, supreme judicial court for the commonwealth, at Boston, January term, 1867.

IN THE CASE OF DAVID SEARS, JR., AND another,
vs.
SETH DEWING & OTHERS.
} Pending in the superior court for the county of Norfolk.

Ordered, That the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment for the plaintiffs for the market value, in treasury notes of the United States, of the stipulated weight of pure gold in the form of coined money, for each quarter's rent at the time when, by the terms of the lease, it became due, with interest, the amount to be ascer-
26 tained by an assessor, unless agreed on by the parties.

By the court.

GEO. C. WILDE, *Clerk.*

JANUARY 7, 1867.

Brief statement of the grounds and reasons of the decision.

The agreement of the parties was for the payment of the stipulated weight of pure gold, in the form of coined money, considered as a commodity and not as money.

And at the December term, 1867, the court appointed William Gaston, esq., as assessor, according to the following order:

COMMONWEALTH OF MASSACHUSETTS, *Norfolk, ss:*

Superior court, December term, 1867.

DAVID SEARS, J'R., ET AL.,
vs.
SETH DEWING ET AL.
} No. 52.

And now it is ordered by the court that William Gaston, esquire, be, and he hereby is, appointed assessor in the above-mentioned ac-
27 tion to hear the parties and examine their evidence, and ascertain the market value, in treasury notes of the United States, of the stipulated weight of pure gold, in the form of coined money, for each quarter's rent at the time when, by the terms of the lease, it became due, with interest, and make report thereof to the court.

EDGAR H. KINGSBURY,
As't Clerk.

And at the April term, 1868, the said assessor returned into court his report of the case in pursuance of said order.

And thence the action was continued to the September term then next following, when the said report was opened; which said report is as follows:

I, William Gaston, the assessor appointed in the within case, have met and heard the parties, and have examined their evidence, and have ascertained the market value, in treasury notes of the United States, of

the stipulated weight of pure gold, in the form of coined money, for each quarter's rent at the time when, by the terms of the lease, it became due, with interest, and report as follows:

28 The annual rent in gold, as aforesaid, is..... $85 27
The quarter-yearly rent in gold, as aforesaid, is..... 21 31

The market value of $21 30 in gold as aforesaid, in treasury notes as aforesaid, I report to be as follows:

On June 1, 1863, with interest to date added, was	$40 47
On Sept. 1, 1863, with interest added to date, was	34 66
On Dec. 1, 1863, with interest to date added, was.....	39 99
On March 1, 1864, with interest to date added, was.....	42 46
On June 1, 1864, with interest to date added, was.....	49 83
	$207 41

W'M GASTON, *Assessor.*

Fee of assessor, $15 00.

And thence the action was continued to the December term then next following. And now the parties appear, and the plaintiffs move the court that the report of the assessor be accepted and judgment be entered thereon. And on the 2d day of February, A. D. 1869, it is ordered by the court that the report of the assessor be accepted and judgment entered thereon.

29 It is therefore considered by the court that the said David Sears, junior, Frederick R. Sears, and Knyvet W. Sears recover against the said Seth Dewing and Ephraim Graham the sum of two hundred and fourteen dollars and ninety-three cents damage, and costs of suit, taxed at one hundred and three dollars and seventy-six cents.

All and singular which premises we have held good, by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Lincoln F. Brigham, esquire, chief justice of our said superior court, at Dedham, in said county, this 2d day of February, A. D. 1869.

[SEAL.] ERASTUS WORTHINGTON, *Clerk.*

30 COMMONWEALTH OF MASSACHUSETTS:

I, Lincoln F. Brigham, chief justice of the superior court of the Commonwealth of Massachusetts, do certify that Erastus Worthington, esq., whose signature is affixed to the papers hereto annexed, is clerk of said superior court within and for the county of Norfolk, and hath the keeping of the files, records, and proceedings of said court within and for said county; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said court; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereto annexed of the files, records, and proceedings of the said superior court are in due form.

In testimony whereof I have hereunto set my hand and caused the

seal of said court to be hereunto affixed this second day of February, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.]

LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

(Indorsement on cover:) No. 340. Seth Dewing and Ephraim Graham, plaintiffs in error, vs. David Sears, jr., F. R. Sears, and K. W. Sears. Massachusetts superior court.

Filed 10th December, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 340.

SETH DEWING AND EPHRAIM GRAHAM, PLAINTIFFS IN ERROR,

vs.

DAVID SEARS, JR., F. R. SEARS, AND K. W. SEARS.

PLAINTIFFS IN ERROR, BRIEF.

1. This case is not distinguishable from

Butler *v.* Horwitz, 7 Wall. 258.
Et vide Bronson *v.* Rodes, *id.* 229.

The action in the Court below was brought to recover rent due upon a lease executed August 14, 1828, for the term of one hundred years, in which the yearly rent reserved was "four ounces, two pennyweights, and twelve grains of pure gold, *in coined money*," payable quarterly. The rent sued for fell due for the quarters ending June 1, September 1, and December 1, 1863, and March 1, and June 1, 1864.

By the Act of April 2, 1792, ch. 16, section 9, 1 Stat. at Large 248, which was in force when the lease was made, the rent was just $80 per annum, or $20 a quarter, in gold coin.

But by the Act of June 28, 1834, ch. 95, 4 Stat. at Large 699, and the Act of January 18, 1837, ch. 3, sections 8 and 10, 5 Stat. at Large 137, 138, which were in force when the rent sued for fell due, the rent was $85.27 per annum, or $21.31 a quarter, in gold coin. The State Court, instead of giving judgment for the rent and interest in coined money, gave judgment for the market value, in United States notes, of the coined money for each quarter's rent on the days the same fell due, with interest thereon.

The case is therefore identical with

Butler *v.* Horwitz, above cited.

E. M. BIGELOW,
Attorney for the Plaintiffs in Error.

Supreme Court of the United States.

No. 340.

SETH DEWING AND EPHRAIM GRAHAM

vs.

DAVID SEARS, JR., F. R SEARS AND K. W. SEARS.

PLAINTIFFS IN ERROR BRIEF.